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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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At issue in this case is whether the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, protects the ability of newly-hired workers, who were not hired as strike replacements, to participate in lawful strike activity on the date designated by the carrier as their first day of employment. As petitioner Air Line Pilots Association, International ("ALPA") explained in its petition, the court of appeals' construction of § 1, Fifth of the RLA, 45 U.S.C. § 151, Fifth, to deny such protection to the Group of 500 in this case disregards the undisputed congressional intent underlying that provision, clashes with the settled judicial and administrative approach to § 1, Fifth, and directly conflicts with the First Circuit's decision in *NLRB* v. *New England*

Tank Indus., Inc., 302 F.2d 273 (1st Cr.), *cert. denied*, 371 U.S. 875 (1962). In addition, the court of appeals impermissibly engaged in de novo factfinding in applying its newly-devised interpretation of § 1, Fifth to the circumstances surrounding the Group of 500's pre-strike relationship with respondent United Air Lines, Inc. ("United").

In response, United is content to ignore both the central question presented by this dispute and the Seventh Circuit's actual resolution of that question. Thus United offers *no* defense whatsoever of the court of appeals' mistaken interpretation of the language contained in § 1, Fifth but instead turns to a handful of cases involving "trainees" or "applicants" who, unlike the Group of 500, were not actually hired and unconditionally directed to commence employment on a specified date and did not choose to participate in a lawful strike on their first day of work. United likewise brushes aside the court of appeals' de novo factfinding on the manifestly false representation that the district court determined that the Group of 500 did not "perform work" for United before the strike. United's conspicuous silence on any of the issues raised by ALPA's petition underscores the need to review the Seventh Circuit's decision in this case.

1. Without considering any of the policies underlying § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth, the court of appeals determined that it was "forced to conclude" (App. 44a) that the "ordinary meaning" (App. 48a) of § 1, Fifth barred any consideration of whether newly-hired pilots became RLA employees on the date designated by the carrier as their first day of employment because such pilots "never performed work for the employer and [were] never under that employer's direct supervision." (App. 47a). As ALPA explained in its petition, however, the court of appeals simply misunderstood the statutory terms

contained in § 1, Fifth. Congress quite plainly intended the "performs work" clause in § 1, Fifth to exclude independent contractors from RLA coverage and the "supervision" clause to exclude supervisors or management employees. (Pet. 9-10). United does not dispute this critical legislative intent. Accordingly, the court of appeals' *sole* ground for reversing the district court's application of the RLA to the Group of 500 constituted a mistaken application of statutory terms that Congress did not intend to cover the circumstances involved in this case. United is unable to articulate any explanation for this fatal error and indeed offers absolutely no defense of the Seventh Circuit's unprecedented construction of § 1, Fifth.

Instead, United maintains that the decision below is "fully consistent" (Opp. Br. 6) with two RLA cases and two cases decided under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, involving applicants or trainees. (Opp. Br. 6-7). Yet none of these cases involved workers who. like the Group of 500, were hired and assigned unconditional employment dates. The trainees involved in United's FLSA cases, for example, merely constituted a pool of qualified individuals available for possible *future* job offers upon the completion of training. *See Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 149-50 (1947); *Donovan* v. *American Airlines, Inc.*, 686 F.2d 267, 268-70 (5th Cir. 1982). In any event, the determination of whether trainees constitute FLSA "employees," *see* 29 U.S.C. §§ 203(e)(1), 203(g), depends on whether their activities "immediately benefit" the employer, not on the "performs work" analysis adopted by the court of appeals in this case. *See Walling*, 330 U.S. at 152-53; *Donovan*, 686 F.2d at 271-72. The RLA decision in *Nelson* v. *Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), likewise involved a job applicant who was *not*

offered employment on the basis of his pre-application conduct at another employer. *See id.* at 1235.[1]

As the district court recognized in this case, the Group of 500 cannot possibly be equated with these trainees or applicants. (App. 67a-68a, 103a-104a). In late April of 1985, the Group of 500 accepted United's unconditional employment offers which plainly designated May 17, 1985 as their first day of employment and which did not require Group members to work during a strike. (App. 67a-68a). When Group members began reporting for refresher training in early May of 1985, United confirmed that they would assume "permanent status" on May 17. (App. 67a). It was not until well *after* United hired the Group of 500 and unconditionally established May 17 as their first day of work that United began to view them as potential strike replacements. (App. 69a-70a, 108a).[2] As of May 17, 1985, United and the Group of 500 had thus established the "employment relationship" required by § 1, Fifth. *See Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 552 (1956). That relationship has never depended on the "perfroms work" analysis now required by the Seventh Circuit. *See, e.g., Scheduled Skyways, Inc.*, 10 N.M.B. 488 (1983) (treating pilot trainees on the carrier's payroll as RLA employees); *Air Micronesia*, 10 N.M.B. 11 (1982) (RLA

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[1] The only § 1, Fifth issue in *International Longshoremen's Ass'n* v. *North Carolina State Ports Auth.*, 370 F. Supp. 33 (E.D.N.C. 1974), *aff'd per curiam*, 511 F.2d 1007 (4th Cir. 1975), was whether the defendant's employees were involved in the defendant's railroad rather than its trucking operation. *See id.* at 39-40.

[2] Accordingly, United's statement that the Group of 500 "knew well in advance of May 17, 1985" that United "viewed" them as potential strike replacements (Opp. Br. 5) simply misrepresents the district court's explicit finding that United did *not* hire Group members to serve as strike replacements. (App. 68a). United pursued an entirely separate program for hiring strike replacements. (App. 107a).

employee status depends on an individual's reasonable expectation of performing future services for the carrier).

The *only* prior case involving similar facts is the First Circuit's decision in *New England Tank* which explicitly held that individuals who accept employment offers unconditionally designating their first day of employment enter an employment relationship—and thus can participate in protected strike activity—on their first day of work without first "physically report[ing] on the job." *New England Tank*, 302 F.2d at 278. United offers no basis either for distinguishing *New England Tank* or for disregarding the direct conflict between *New England Tank* and the Seventh Circuit's decision in this case.[3] Indeed, the court of appeals itself recognized that *New England Tank* supported the district court's treatment of the Group of 500 and only declined to follow the First Circuit on the basis of its mistaken understanding of the statutory terms contained in § 1, Fifth. (App. 47a-48a). Given United's complete failure to defend the court of appeals' opinion, the Court should grant review in this case to resolve the direct conflict between the Seventh and the First Circuits over whether newly-hired workers can join in protected strike activity on the date designated by the employer as their first day of work.

Moreover, United also offers no response to ALPA's argument that United's attempt to coerce the Group of 500

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[3] Contrary to United's cryptic discussion of *New England Tank*, that case did not in any sense turn on the definition of "employee" or the "unique unfair labor practice provisions" contained in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (Opp. Br. 9). As the court of appeals held in this case, § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth—like its NLRA counterparts—protects strikers from employer retaliation. (App. 16a-21a). *See Railway Labor Executives' Ass'n* v. *Boston & Maine Corp.*, 808 F.2d 150, 157 (1st Cir. 1986).

into serving as involuntary strikebreakers constituted unlawful RLA self-help that violated the § 2, Fourth rights of the *incumbent* striking pilots. (Pet. 15-16). The district court's findings establish that United's threats to the Group of 500 lacked any business purpose and constituted part of an overall plan to undermine ALPA's status as the collective bargaining representative of United pilots. (App. 70a-72a, 103a, 107a-108a). The RLA protects the incumbent striking pilots—all of whom are indisputably RLA employees—from such anti-union conduct regardless of whether the court of appeals correctly applied § 1, Fifth to the Group of 500. (App. 16a-21a). *Cf. NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-37 (1963).

2. Having reversed the district court and adopted a new legal standard for determining employee status under the RLA, the court of appeals was not free to make "factual findings on its own," *Icicle Seafoods, Inc.* v. *Worthington*, 106 S. Ct. 1527, 1530 (1986), or even to apply its new standard to the facts found by the district court. Rather, it was obligated to review the record as a whole to determine whether the "record permits only one resolution of the factual issue." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). As ALPA explained in its petition, however, the court of appeals explicitly limited its review to "the factual findings made by the district court" (App. 42a) despite the existence of unresolved factual issues under its new legal standard that were never considered by the district court. (Pet. 16-20). The court of appeals also improperly found the facts relevant to its new legal standard. (*Id.*).

United's only explanation for the court of appeals' independent factfinding is its repeated claim that the district court "found" that the entire Group of 500 did not become RLA employees *prior* to May 17. (Opp. Br. 12-14). In making that finding, however, the district court applied

the same legal standard it applied to hold that the Group of 500 were employees *on* May 17 and which the court of appeals reversed. As a result, the district court never considered the court of appeals' "performs work" standard (App. 101a-108a) and thus could not possibly have found that the pre-strike activities of all Group of 500 members did or did not constitute "work" under United's "supervision" in accordance with the court of appeals' new interpretation of § 1, Fifth.

Since the nature of a pilot's relationship to United is dispositive under the court of appeals' new legal standard, the labels "student pilots" and "trainees" occasionally used by the district court to describe the Group of 500 (Opp. Br. 12) cannot answer the factual question of whether the "particular activities" of specific Group members prior to May 17 satisfy that new legal standard. *See Icicle Seafoods*, 106 S. Ct. at 1529. As United correctly observes, for example, the district court never determined whether the Initial Operating Experience ("IOE") under United's supervision undertaken by several Group members satisfied the court of appeals' test for RLA employees status. (Opp. Br. 13). Whether IOE constitutes "work" under that test thus plainly presents a question of fact for the district court even if IOE is work necessary " 'to become fully qualified to engage in line flying.' " (*Id.*) (quoting App. 67a). United also ignores ALPA's demonstration of factual issues concerning whether the refresher training entered into by a substantial number of Group members constituted work under United's supervision. (Pet. 19). Since the district court did not make findings "essential to a proper resolution of the legal question" as newly defined by the court of appeals, *see Icicle Seafoods*, 106 S. Ct. at 1530, and since the record clearly "permits [more than] one resolution of

the factual issue," *Swint* 456 U.S. at 292, the court of appeals was obligated to remand for further proceedings.[4]

In any event, the presence of Flight Officer Training Instructors (FOTI's) among the Group of 500 forecloses any argument against the necessity of a remand in this case. Notwithstanding the court of appeals' factual findings, the National Mediation Board has held that United's FOTI's are RLA employees, and a federal court has held that FOTI's among the Group of 500 were RLA employees on May 17. (Pet. 18). United's argument that the FOTI's were "in a separate job classification at United from that of pilot" (Opp. Br. 14 n.12) is simply irrelevant to their status as RLA employees on May 17 under the court of appeals' literal construction of § 1, Fifth. *See also* 45 U.S.C. § 181 (extending RLA coverage to pilots and other employees of air carriers).

[4] Given the district court's rejection of "ALPA's argument that the Group of 500 became employees upon their initial date of training" (App. 103a), United's contention that ALPA never argued that the Group of 500 became employees prior to May 17 (Opp. Br. 12-13) is inexplicable. ALPA also argued in the court of appeals that the Group of 500 were entitled to employee status prior to May 17. (Brief of Plaintiff-Appellee, Cross-Appellant at 39-44; Reply Brief of Plaintiff-Appellee, Cross-Appellant at 9-17).

For these reasons, and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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